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Nos. 80-2122 and 81-350

In the Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Case:

International Minerals & Chemical Corp. v. *ICC*, No. 80-2096 (7th Cir. Aug. 3, 1981) 5

Statutes and regulation:

49 U.S.C. (Supp. III) 10903 1-2

49 U.S.C. (Supp. III) 10905 2

49 U.S.C. (Supp. III) 10905(a)(1) 3

49 C.F.R. 1121.32(d)(1) 2

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Petitioners contend that the court of appeals erred in setting aside an order of the Interstate Commerce Commission allowing the Illinois Central Gulf Railroad Company to abandon one of its lines. The issue in this case is whether the Commission properly considered certain labor costs to be "avoidable" in authorizing the abandonment.

1. In December 1977, petitioner Illinois Central Gulf Railroad Company (ICG) applied to the Interstate Commerce Commission, pursuant to 49 U.S.C. (Supp. III)

10903, for authority to abandon a 96-mile railroad line between Cherokee, Iowa and Sioux Falls, South Dakota (Pet. App. A-2 to A-3).[1] As required by Commission regulations, ICG submitted data on revenues created by the line and the "avoidable costs" that would be saved by abandonment of the line. 49 C.F.R. 1121.32(d)(1).[2]

The Administrative Law Judge excluded ICG's data for labor costs of enginemen and trainmen, finding that these costs were not "avoidable" (Pet. App. F-10). This conclusion was based on the testimony of a union representative that the collective bargaining agreement with ICG required two crews regularly to remain on the line regardless of whether any train operates on the line (*id.* at A-14 n.7, F-9). Petitioner ICG neither presented evidence to contradict this description of the labor contract nor placed a copy of the collective bargaining agreement into the record (*id.* at F-10). The ALJ therefore concluded that abandonment of the line would not save ICG any of its labor costs. Elimination of these and other costs[3] left ICG with a "paper profit" from the line, which made abandonment inappropriate (*id.* at F-11, F-29 to F-33).

The ICC sitting as a whole rejected the ALJ's conclusion that the labor costs were not "avoidable" (Pet. App. D-3 to

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[1]"Pet. App." refers to the appendix to the petition in 80-2122.

[2]Neither the statute nor the regulations relevant to abandonment define "avoidable costs." A related provision in the statute dealing with subsidies to avoid abandonment defines avoidable costs as "all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line * * * were abandoned." 49 U.S.C. (Supp. III) 10905.

[3]The ALJ also excluded property taxes on the railroad line on the theory that, since ICG had no immediate offers to buy the property, no tax savings would accrue immediately from an abandonment (Pet. App. F-11).

D-7).[4] With regard to ICG's obligations under the collective bargaining agreement, the Commission remarked (*id.* at D-6 n.5):

> [N]o one contends that [the employees] will continue indefinitely to be paid for doing nothing. At most it will be until the local agreement is next negotiated, or in the most extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place.

Based on its assessment that the labor costs eventually would be saved, the Commission held that it was permissible to regard them as avoidable costs (*id.* at D-7). Allowing these and other costs[5] to be included in the calculations, the Commission determined that abandonment was appropriate (*id.* at D-12).

A divided panel of the court of appeals reversed (Pet. App. A-1 to A-27). The court remarked that the only evidence in the record regarding the terms of the collective bargaining contract between ICG and the union supported the ALJ's finding that "the wages of two train crews would have to be paid *indefinitely* * * * regardless of whether the Sioux Falls District line were abandoned" (Pet. App. A-14) (emphasis added). The court therefore concluded that these costs could not be considered "avoidable," as that term is defined in 49 U.S.C. (Supp. III) 10905(a)(1) (Pet. App. A-15). Although it also disagreed with the Commission's conclusion that a proper balancing of the private and public

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[4]The case initially was reviewed by a Division of the Commission (Pet. App. E-1 to E-10), which declined to follow the ALJ's recommendation and authorized abandonment of the line (*id.* at E-8). Thereafter, the full Commission granted review.

[5]The Commission also rejected the ALJ's conclusion regarding property taxes. It concluded that ICG would be able to sell the abandoned property within a reasonable period and therefore avoidance of these costs would merely be delayed and not denied (Pet. App. D-8 to D-9).

interests at stake supported abandonment of the line (*id.* at A-16 to A-17), the court recognized that it could not overturn the Commission's judgment on this issue and remanded for further proceedings (*id.* at A-17).[6]

2. The United States does not believe that the decision below merits review by this Court. The decision is based on the factual finding that the contract involved in this case requires ICG to pay wages to workers on the Cherokee-Sioux Falls line "indefinitely," even in the event the line is abandoned. While the Commission almost certainly was correct in concluding that the contract could not really contain such a provision, the railroad failed to submit any evidence into the record before the ALJ on the issue. Thus, the case involves a simple factual difference between the Commission and the court in circumstances where the record is needlessly incomplete. This is not a dispute that requires resolution by this Court.

Once the court of appeals' factual assertion is accepted, it is difficult to quarrel with its conclusion that the labor costs are not "avoidable." If costs would be incurred "indefinitely," regardless of abandonment, then they hardly can be described as "avoidable." The Commission recognized as much in its decision when, in regard to the property tax issue, it described an avoidable cost as one that "can with reasonable certainty be avoided within a reasonable time following abandonment" (Pet. App. D-8). The labor costs as viewed by the court of appeals do not satisfy this test.[7]

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[6]The court of appeals affirmed the Commission's determination that ICG's property taxes are "avoidable" costs (Pet. App. A-12 n.5).

[7]The Commission contends (Pet. 14-15) that the court of appeals' treatment of the property taxes and the labor costs is wholly inconsistent. It is the difference between these issues, however, that demonstrates the narrowness of the court's holding on labor costs. Obviously, the

The unusual factual posture of this case also reduces the potential harm it may cause the Commission in future abandonment cases. Indeed, the Seventh Circuit recently considered the same issue and had no difficulty limiting the Eighth Circuit's decision to its facts. In *International Minerals & Chemical Corp.* v. *ICC*, No. 80-2096 (Aug. 3, 1981), slip op. 8, the Seventh Circuit found that its case presented "no issue about a restrictive collective bargaining agreement" and that "it was only the application of [general] principles to a certain narrow fact situation that caused the controversy in *Cherokee*." The court also remarked that the Eighth Circuit confronted a situation "where wages must be paid pursuant to a collective bargaining agreement regardless of operations over the line, [so] the labor expenses cannot be considered avoidable" (*ibid.*), whereas its case did not "involve such a labor agreement." Slip op. 10. It is doubtful that any other court of appeals will be faced with "such a labor agreement," and therefore it is most unlikely that any other court of appeals will reach the same conclusion as the court below.

This is an unusual case, made so primarily by the railroad's failure to make a complete record before the ALJ. The best solution is for the Commission on remand to reopen the proceedings and allow the development of a

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court must have accepted the Commission's theory that deferral of cost savings for a reasonable period, *i.e.*, the time required to sell the property, is not enough to make costs unavoidable. Thus, if the record had shown that the labor costs would be incurred only for a short period after abandonment, the court presumably would have decided the labor cost issue in the same way as the property tax issue. This seems particularly likely in light of the strong policy arguments advanced by the Commission in support of including labor cost savings that are—as the Commission assumed (but the record did not show)—deferred for only a few years (Pet. App. D-5 to D-6).

more complete record on the labor cost issue. Review by this Court is not required to achieve that result.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[8]The Commission (Pet. 15-17) and ICG (*id.* at 23-27) also complain about the court of appeals' statement regarding the Commission's balancing of the relevant interests. In light of the court's holding on the labor costs issue, however, a remand was required in any event. Thus, there is no independent significance to the court's discussion regarding the proper balance of interests. Although it was perhaps inappropriate for the court to offer these views *sua sponte*, the comments are mere dicta.

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